91-1123

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES F. RIVES, II,
Marv A. Seurer; Ronald D. Pester,
Tom Hampleman; R.D. Griffin;
John A. Cameron; Marv Slusser;
and Gene Dudley,
Petitioners,
v.
INTERSTATE COMMERCE COMMISSION,
United States of America,
Respondents.

UNION PACIFIC MOTOR FREIGHT COMPANY,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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DATE: November 15, 1991

QUESTIONS PRESENTED

1. Whether in a railroad consolidation the employees of a wholly-owned motor carrier subsidiary limited to "auxiliary to and supplemental of" to rail service are within the class of employees entitled to mandatory labor protective conditions under 49 U.S.C. §11347?

2. Whether the nature of the work performed and not simply the identity of the employer is the determining component of entitlement to mandatory labor protective conditions under 49 U.S.C. §11347?

3. Whether the precedent establishing mandatory labor protective conditions for employees of wholly-owned motor carrier subsidiaries in a railroad consol--idation is the proper interpretation of 49 U.S.C. §11347 or

whether the decision of the U.S. Court of Appeals for the Tenth Circuit in the Interstate Commerce Commission denying mandatory labor protection in this case is the proper interpretation of that statute?

4. Whether the determination of the nature of the work performed is an unnecessary and undesirable role for the Commission?

5. Whether 49 U.S.C. §11347 is sufficiently ambiguous to warrant an unqualified affirmation of the Commission action under Chevron U.S.A., Inc. v. Natural Resources Defense Council.

6. Whether the U.S. Court of Appeals erred in declining review of the employees' entitlement to a discretionary labor protection by affirming the Interstate Commerce

Commission's refusal to award discretionary benefits?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are former employees of the Union Pacific Motor Freight Company ("UPMF")[1/], a wholly-owned subsidiary of the Union Pacific Railroad Company ("UP").

Petitioners:	Charles F. Rives, II Marv A. Seurer Ronald D. Pester Tom Hampleman R.D. Griffin John A. Cameron Marv Slusser Gene Dudley
Respondents:	Interstate Commerce Commission United States of America
Intervenor:	Union Pacific Motor Freight Company

[1/] Petitioners believe UPMF is but one segment of a large group of companies. The specific identify of those other corporations or entities is unknown.

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PRIOR OR RELATED APPEALS

This proceeding arises from a decision of the Interstate Commerce Commission: Union Pacific--Control--Missouri Pacific; Western Pacific, 366 I.C.C. 462 (1982), affirmed in Southern Pacific Transportation Co. v. ICC, 736 F.2d 708 (D.C.Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

This proceeding was before the United States Courts of Appeal for the Eighth and Tenth Circuits under the following designations:

Creiger, et al. v. ICC,
Case No. 87-1723
(8th Cir. docketed June 3, 1987)

Rives v. ICC, No. 88-2957
(10th Cir. docketed June 3, 1987)

Seurer, et al. v. ICC,
Case No. 87-2037
(10th Cir. docketed June 19, 1987)

Seurer, et al. v. ICC, No. 88-2956
(10th Cir. docketed June 19, 1987)

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INTERSTATE COMMERCE COMMISSION,
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Respondents.

UNION PACIFIC MOTOR FREIGHT COMPANY,
Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 6, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 934 F.2d 1171 (10th Cir. 1991) and appears in the Appendix commencing at page 1a.

The April 3, 1987 Decision and April 12, 1989 Reopened Decision opinions of the Interstate Commerce Commission, which have not been reported, appear in the Appendix commencing at 18a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Tenth Circuit was

entered on June 6, 1991. A timely Petition for Rehearing and suggestions for rehearing en banc was denied August 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)(1988).

STATUTES INVOLVED

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. §5(2)(f) (1976), is set forth in the Appendix at 72a. That section has been recodified at 49 U.S.C. §11347 (1982). Section 11347 is set forth in the Appendix at 56a.

Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. §5(2)(c) (1976) is set forth in the Appendix at 71a. That section has been recodified, in pertinent part, at 49 U.S.C. §11344(b)(2)-(c) (1982). Section 11344(b)(2)-(c) is set forth in the Appendix at 51a.

STATEMENT OF THE CASE

A. NEW YORK DOCK LABOR PROTECTIVE CONDITIONS--GENERALLY

It has long been recognized that the consolidation or merger of carriers subject to the jurisdiction of the Interstate Commerce Act could have a "devastating effect[]" on the employees of those carriers.[2/] Congress enacted The Transportation Act of 1940 requiring the protection of employees affected by a merger or consolidation of Class I railroads. That law was entitled 49 U.S.C. §5(2)(f) and was subsequently recodified as 49 U.S.C. §11347. This Court has addressed the importance of labor protective conditions on more than one

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2/ New York Dock Railway v. United States, 609 F.2d 83, 86 (2d Cir. 1979).

occasion.[3] See also Nemitz v. Norfolk & Western Railway Company, 404 U.S. 37 (1971).

Over the years the ICC moulded and refined the labor protective conditions. The most recent vintage is the so-called "New York Dock Conditions" which provide for dismissal, displacement, fringe benefits and moving allowances.[4] Pursuant to 49 U.S.C. §11347, labor protective conditions are a mandatory aspect for approving a con-

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[3] Railway Labor Executives' Association v. United States, 339 U.S. 142 (1950), discusses the origination of employee protective conditions in the Washington Job Protection Agreement of 1936 which was a voluntary arrangement between railroads and their labor unions and was designed to limit labor strife during railroad mergers.

[4] New York Dock Railway--Control--Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979), aff'd sub nom New York Dock Railway v. United States, 609 F.2d 83 (2d Cir. 1979).

solidation or merger of two Class I railroads. Those conditions were required to be "no less protective of the interest of employees than those heretofore imposed".[5/] The Appendix to the New York Dock case setting forth the level of protection is found commencing at Appendix 57a. During the re-codification process, the language of former §5(2)(f) referring to "railroad employees" was deleted and in its place the term "employees" was inserted in new §11347 for clarity.[6/]

[5/] Pub. L. No. 94-210, ¶402(a), 90 Stat. 31 (1976), amending 49 U.S.C. §5(2)(f). Under this amendment the level of protection was required to be no less favorable than the conditions previously imposed.

[6/] H.R.Rep.No. 95-1395, 95th Cong., 2d Sess. 166 (1978).

B. STATUTORY AUTHORITY FOR LABOR PROTECTIONS

1. Mandatory Labor Benefits

Mandatory labor protection is afforded to "employees affected by" a railroad consolidation under 49 U.S.C. §11347 (1982), which is reproduced in the Appendix at 56a. Prior to the re-codification of this section, 49 U.S.C. §5(2)(f) governed these benefits and required the Commission to consider the effect of a consolidation on "the interests of the railroad employees affected". Appendix at 71a. The language change between the old Section 5(2)(f) "railroad employees" and new Section 11347 "employees" was made "for clarity".[7/]

[7/] H.R.Rep.No. 95-1395, 95th Cong., 2d Sess. 166 (1978).

2. Discretionary Labor Benefits

Discretionary labor protection is codified at 49 U.S.C. 11344(b)(2)(C) (1982) and is reproduced in the Appendix at 51a to 55a. The Commission is afforded discretion to fashion protective conditions whenever consistent with the public interest.

C. **HISTORY OF THE CASE**

This case concerns the granting of labor protective conditions in a major rail consolidation, the unification of the Union Pacific Railroad Company ("UP"), the Missouri Pacific Railroad Company ("MP") and the Western Pacific Railroad Company ("WP"). In 1982 the ICC approved this consolidation in a proceeding entitled Union Pacific Corporation, Pacific Rail

System, Inc., and Union Pacific Railroad Company--Control--Missouri Pacific Corporation and Missouri Pacific Railroad Company, Gary W. McPherson v. Union Pacific Motor Freight Co., et al, Finance Docket No. MC-30,000. Prior to this consolidation, there were two wholly-owned motor carrier subsidiaries operated by the UP and MP, namely Union Pacific Motor Freight ("UPMF") and Missouri Pacific Truck Line ("MPTL"). UPMF held a Certificate of Public Convenience and Necessity from the ICC authorizing it to perform trucking services but limiting the authority to auxilliary to or supplemental of UP rail service. Included in the application for consolidation, authority was sought to acquire joint control over UPMF and MPTL in Docket

No. MC-F-14449. The motor carrier aspects and the rail aspects of the entire transaction were consolidated by the ICC. In its Order approving the consolidation, the ICC ordered the standard level of New York Dock labor protective benefits.

This case arose when the Petitioners lost their employment with UPMF following the consolidation. The Petitioner, who had been employed by UPMF from twelve to twenty-five years and who performed ramping and deramping functions on TOFC (trailers on flat cars) and COFC (containers on flat cars) rail shipments, believed they were entitled to labor protection under the New York Dock Conditions. The ICC reopened the proceeding at the request of the Petitioners but determined the Petitioners were not

entitled to the New York Dock Condition benefits because they were employees of the wholly-owned subsidiary, UPMF, rather than technical employees of the railroad.[8/]

At this point it is necessary to digress. Initially there were seven (7) claimants who worked at the UPMF facility in Kansas City; seven (7) claimants who worked at the UPMF facility in Denver; and an unrelated claimant, Gary W. McPherson (who is not involved in this Petition) who sought benefits. In the early post-consolidation proceeding before the ICC, the seven Denver Petitioners and Mr. McPherson were not represented by present counsel. Subsequently, the seven

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[8/] Union Pacific Corp., et al. v. Union Pac. Motor Freight Co., et al., Finance Docket No. MC-30,000 (served April 27, 1987).

Denver claimants employed present counsel. Following the initial denial by the ICC, the seven Kansas City claimants filed a Petition for Review with the United States Court of Appeals for the Eight Circuit in Creiger v. I.C.C., No. 87-1723 and the seven Denver claimants filed a Petition for Review before the United States Court of Appeals for the Tenth Circuit in Seurer v. I.C.C., No. 87-2037. Because the Eighth Circuit proceeding was first-filed, both appeals were consolidated and transferred to the Eighth Circuit.

Before the issues were briefed in the Eighth Circuit, UPMF requested the ICC reopen the proceeding and requested the Eighth Circuit to defer the consolidated Petition for Review until the ICC

acted. On August 17, 1987, the ICC issued a Decision reopening the proceeding and requiring additional evidence and briefs to consider whether UPMF employees had sufficient notice of consequences of the consolidation and the labor protection they might receive.

While awaiting a decision from the ICC, six of the original Petitioners in Creiger entered a Settlement Agreement with UP and withdrew their Petition for Review. Thereafter, on the request of the ICC and UPMF, the Eighth Circuit referred the matter back to the Tenth Circuit based on the residency of the eight remaining Petitioners, i.e., Kansas and Colorado. The Tenth Circuit renumbered the two Petitions for Review as Seurer, et al. v. ICC, No. 88-2956 and Rives v.

I.C.C., No. 88-2957. Undersigned counsel references the settlement simply for the purpose of explaining how the various Petitions for Review were transferred from one Circuit to the other.

Finally, by Decision dated April 12, 1989, the ICC issued its ruling on the reopened proceeding (hereinafter the "Decision").[9/] In the reopened proceeding, the ICC again denied benefits to the Petitioners in a three to two Decision. In that split decision, Vice Chairman Simmons dissented forcefully concerning the majority's disregard for controlling legal precedent, stating: "[T]he Commission must take into account the

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9/ Union Pacific Corp, et al. v. Union Pac. Motor Freight Co., et al., Finance Docket No. 30,000 (served (April 20, 1989), set forth in the Appendix at 36a to 50a.

Cosby decision and not simply shrug it off. While we may view that decision as inconsistent with prevailing Commission precedent, it is ... controlling and binding until otherwise reversed by the courts or legislation." [10/] (emphasis added).

In addition, Commissioner Lamboley stated in dissent: "the majority's position runs contrary to statute and precedent. Nothing in the legislative history limits or precludes eligibility for protections of persons employed by motor carriers providing services substantially integrated with and directly beneficial to the rail carrier...".[11/]

[10/] ICC Decision, April 20, 1989, p.4, set forth commencing at Appendix p. 36a.

[11/] Id.

The Petitioners then sought review before the United States Court of Appeals for the Tenth Circuit, from which this case arises. That Court of Appeals affirmed the Decision of the ICC primarily based upon this Court's interpretation of administrative law in Chevron.[12/] In so doing, it found the intent of Congress was not clear and, therefore, the administrative agency could interpret the statute as it deemed desirable. The Petitioners submit the Court of Appeals for the Tenth Circuit erred in several respects and most particularly in not following the precedent enunciated by its sister court, the United States Court of Appeals for the Eighth Circuit in a

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12/ Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

virtually identical case. Consequently, this Petition for Writ of Certiorari is being filed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE U.S. COURT OF APPEALS HAS CREATED A CONFLICT WITH A PREVIOUS DECISION OF THE U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT WHICH SHOULD BE RESOLVED BY THIS COURT.

A. THE EIGHTH CIRCUIT PREVIOUSLY RULED IN COSBY V. I.C.C., 741 F.2d 1077 (1984), cert. denied 471 U.S. 1110 (1985), THAT EMPLOYEES OF A WHOLLY-OWNED MOTOR CARRIER SUBSIDIARY OF A RAILROAD WHICH WAS LIMITED BY THE ICC TO PERFORM SERVICES IN AUXILIARY OR SUPPLEMENTAL RAIL SERVICE WERE ENTITLED TO LABOR PROTECTIVE CONDITIONS.

The first and foremost reason for granting this Petition is to resolve the obvious conflict between the opinion of the Court of Appeals for the Tenth Circuit with a previous decision of the Court of Appeals for the Eighth Circuit.[13/] The facts in this case are virtually

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13/ Cosby v. I.C.C., 741 F.2d 1077 (8th Cir. 1984), cert. denied 471 U.S. 1110 (1985).

identical to the facts in Cosby. In Cosby the Burlington Northern Railroad Company ("BN") consolidated with the St. Louis-San Francisco Railway Company ("Frisco"). Both BN and Frisco operated a wholly-owned motor carrier subsidiary. The ICC approved the consolidation as well as the control of the motor carriers and in so doing, conditioned the approval on the issuance of labor protection as required by 49 U.S.C. §11347 through the standard New York Dock Conditions. Following the consolidation, employees of the wholly-owned motor carrier subsidiary of Frisco were laid off and they sought benefits under the New York Dock Conditions. Those benefits were denied by BN and the denial was initially approved by the ICC for the stated reason that employees of

a subsidiary were not in the intended class to be protected under the statute. An appeal was taken in the United States Court of Appeals for the Eighth Circuit which reversed the Decisicn of the ICC and held that the employees of a motor carrier subsidiary were covered by the protective conditions. Pivotal to that case and also present herein was the fact the operating authority of the wholly-owned motor carrier subsidiary in Cosby was limited by the ICC to auxiliary to or supplemental of rail service transportation. The facts herein are almost identical. If there is a difference, the facts gravitate to higher protection rather than lower protection inasmuch as the individual claimants herein worked

with TOFC and COFC shipments which were transported by rail.[14/]

Notwithstanding the interpretation of the statute by the Court in Cosby, the majority for the ICC steadfastly refused benefits to the employees in this proceeding for the same reason the claimants in Cosby were initially denied, namely that the employees of a wholly-owned motor carrier subsidiary were not entitled to the protective benefits even though the scope of their work was limited to auxiliary to and supplemental of rail service. The Court of Appeals for the Tenth Circuit affirmed that decision under the Chevron doctrine which creates the obvious conflict between the Circuits.

[14/] Again, TOFC refers to trailers on flat cars and COFC refers to containers on flat cars.

In ignoring the precedential value of the Cosby decision, the Court of Appeals and the ICC have also ignored the historic differentiation between railroads and truck lines impcsed by the ICC. Decades ago it was decided that the National Transportation Policy was best served by having a strong truck industry and a strong rail industry to permit the shipping and consuming public an alternative choice of transportation modes and to provide for the national defense in the event of an emergency. To achieve the goals of the National Transportation Policy, Congress and the ICC greatly limited the ability of railroads to own or operate trucking companies. In balancing the needs of the two industries, railroads were permitted to own and

operate wholly-owned subsidiary truck lines with certain strict limitations. That history was best announced by this Court in U.S. v. Rock Island Motor Transit Co.[15] Therein, the Court found that a railroad's operation of a motor carrier was prohibited by the Motor Carrier Act of 1935[16] and the Interstate Commerce Act[17] of 1940 unless the motor carrier service would be auxiliary to or supplemental of rail service.[18] Although the prohibition has been somewhat eroded, the law in effect at the time of the consolidation still limited a railroad's motor carrier operation to auxiliary to or

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[15] 340 U.S. 419, 430 (1951).

[16] 49 Stat. 543.

[17] 54 Stat. 899.

[18] Id. at 432.

supplemental of rail service unless special circumstances were shown.[19/]

Further, the ICC has a long-standing policy of considering a rail carrier and its subsidiaries as a single transportation system. The Cosby Court correctly referred to the single system doctrine when it stated:

> The Commission has "long considered that a carrier and its subsidiaries constitute a single transportation system with respect to transactions under Section 5 of the Act. "Pennsylvania Railroad Co.--Merger--New York Central R.Co., 347 I.C.C. 536, 546 (1974) (citing Louisville & J.B.& R.Co.--Merger, 290 I.C.C. 725, 733; 295 I.C.C. 11; Woods Industries, Inc.--Control--United Transports, Inc., 85 M.C.C. 672, 675). As the Commission noted in Pennsylvania Railroad, "the parent, by reason of ownership, has the legal

[19/] 49 U.S.C. §10922; American Trucking Associations, Inc. v. U.S., 425 F.Supp. 903 (D.D.C. 1975), aff'd 425 U.S. 955 (1976).

> right to direct the affairs of the subsidiaries and the latter have no alternative but to accept this direction, even if such were to result...in complete abandonment of the subsidiaries' operations or the extinction of their corporate existence". (Citation omitted).

Cosby, et al. v. I.C.C., 741 F.2d 1071, 1080 (1984). As previously stated, the Decision of the ICC in this matter was divided on a three to two vote. Vice Chairman Simmons noted in his dissent that the ICC has previously declared that railroad affiliated motor carrier operations involving TOFC and COFC services are "related to a rail carrier" in the ICC proceeding entitled "Improvement of TOFC/COFC Regulations, Railroad-Affiliated Motor Carriers and Other Motor

Carriers".[20] Vice Chairman Simmons further noted in his dissent that in order to adopt that policy, the ICC first made the determination that the type of transportation provided by the motor carrier affiliated is "related to a rail carrier" under 49 U.S.C. §10505. In a separate dissenting opinion, Commissioner Lamboley noted that the record indicates that UPMF was intimately and significantly tied to the railroad's main service functions as an integral part of the overall transportation system and cited instances where the ICC exempted the merger of motor carriers respectively owned by merging rail carriers based on the obvious significant nexus of activity between the integrated motor carrier

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[20] 3 I.C.C.2d 869 (1987).

subsidiaries and the merged rail carriers.

It is obvious the ICC has adopted a "Monday-Tuesday" approach. On the one hand, it considers wholly-owned motor carrier subsidiaries of a railroad as a part of a single transportation system for its regulatory purposes but, on the other hand, when it comes to the payment of protective benefits, the majority believes the companies are entirely separate and, therefore, the protective conditions are not due the employees.

B. THE COURT OF APPEALS ERRED IN ITS RELIANCE ON KANSAS CITY SOUTHERN INDUSTRIES, INC. V. I.C.C., 902 F.2d 423 (5th Cir. 1990), WHICH IS CLEARLY FACTUALLY DISTINGUISHABLE FROM THE FACTS IN THIS CASE.

The Court of Appeals for the Tenth Circuit seemingly indicates a

conflict existed between the Circuits prior to this case. It cites Cosby for one viewpoint and Kansas City Southern Industries, Inc. v. I.C.C.[21/] for a different viewpoint. The facts in Cosby and the Kansas City Southern cases are clearly distinguishable. In Kansas City Southern the motor carrier subsidiary was **not** limited to auxiliary to or supplemental of rail service by the ICC. Further, the work of the motor carrier subsidiary employees appears not to be intimately tied to rail transportation. In this case, the Petitioners operated machinery known as a piggy packer which was utilized to onload and offload containers and trailers from railroad flatcars, ramped and deramped trailers from

[21/] 902 F.2d 423 (5th Cir. 1990).

railroad flatcars and hostled the trailers around the rail yard. Commissioner Lamboley was correct in his dissent that the work of the Petitioners was intimately tied with rail work. Unfortunately, neither the majority of the ICC nor the Court of Appeals chose to consider those facts. Rather, the ICC majority found the determination of the nature of the work was an "unnecessary and undesirable role" for the ICC.

C. THE COURT OF APPEALS' HOLDING HAS CONFLICTING IMPLICATIONS FOR THE TRANSPORTATION INDUSTRY.

The Circuit Decisions have conflicting implications for the transportation industry as the precedent in the Eighth Circuit is that employees of a motor carrier subsidiary of a railroad in a merger

transaction are required to be afforded mandatory labor protection but employees of a motor carrier subsidiary of a railroad in a merger transaction in the Tenth Circuit are not entitled to mandatory labor protective conditions and in addition, it appears may not even be entitled to discretionary labor protective conditions.

The ICC appears to have decided to provide labor protective benefits to only those railroad workers who received paychecks directly from a railroad. The Federal Court precedent is that employees of railroad motor carrier subsidiaries <u>are</u> entitled to labor benefits. Railroads and their motor carrier subsidiaries are faced with an impossible situation with these conflicting precedents when plan-

ning merger and consolidation transactions. In recent years, the railroad industry has succumbed to numerous mergers. Since 1980 deregulation of the transportation industry under the Motor Carrier Act of 1980[22/] and the Staggers Rail Act of 1980[23/] barriers to railroad acquisition of motor carriers have been eliminated. Significant merger and acquisition activity will result. By sending conflicting signals the Tenth Circuit, Eighth Circuit and ICC have undermined national decision-making in the calculation of merger and acquisition costs. The Tenth Circuit's failure to follow on-point precedent and resolve the conflict between

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[22/] Pub.L.No. 96-296, 94 Stat. 793 (1980).

[23/] Pub.L.No. 96-448, 94 Stat. 1897 (1980).

federal agency decision-making and federal court precedent clearly requires prompt correction.

II. THE COURT OF APPEALS' RELIANCE ON THE ANALYSIS OF CHEVRON U.S.A., INC. V. NATURAL RESOURCES DEFENSE COUNCIL IS MISPLACED BECAUSE 49 U.S.C. §11347 IS NOT AMBIGUOUS. THE COURT, THEREFORE ERRED IN AFFIRMING THE DECISION OF THE ICC WHICH CONFLICTS WITH PREVIOUS COURT PRECEDENT.

The Court of Appeals' principal reason for denying relief to the Petitioners and affirming the ICC was based upon Chevron.[24/] The panel's reliance on Chevron is inappropriate in this instance. The statute, 49 U.S.C. §11347, is unambiguous in mandating merger protective benefits for the "carrier" employees. The opposition will argue as before that the recodification of the Interstate

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[24/] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Commerce Act which modified the statute from railroad employees to carrier employees was not intended to be substantive. The Cosby Court addressed that issue but found it was not necessary to make a ruling concerning the substantive differentiation because the work performed by the motor carrier subsidiary employees for a company that was limited to auxiliary to and supplemental of rail service were, in fact, railroad employees. Petitioners submit that analysis was correct. The deletion of the word "railroad" and insertion of the word "carrier" employees was simply a clarification of the original Congressional intent. The Petitioners herein were performing railroad transportation work albeit through a wholly-owned subsidiary. They were

employees of a carrier regulated by the ICC and, therefore, fall squarely within the protected class under 49 U.S.C. §11347.

The Chevron case does not stand for the proposition that an agency decision should automatically be affirmed. If this Court had intended that result, it would not have overturned the action of the ICC in what many consider to be a well thought out and morally correct policy concerning undercharge cases filed by bankrupt carriers or their collection agents as the Court did in Maislin Industries U.S. v. Primary Steel.[25/]

The Decision of the majority of the ICC pays tribute to form over substance. Simply because there

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25/ ____ U.S. ____, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990).

were historical limitations imposed by the ICC on the operation of trucks by railroads, wholly-owned subsidiaries were formed. Even though the men and women who work for the wholly-owned subsidiaries were carrier employees and performed rail transportation functions, the majority of the ICC has determined they are not entitled to the same level of protection as other railroad employees because they were technically employees of a motor carrier subsidiary.

It is submitted the Chevron criteria does not stand for the proposition that any decision from an administrative agency will be automatically affirmed. While a reviewing court should uphold a defensable construction of an agency's enabling act, it must not

rubber stamp a decision inconsistent with a statutory mandate. The history as well as the court precedent concerning labor protective conditions in the consolidation of rail carriers is well established. The determination by the ICC in this case that individuals who are carrier em-ployees who perform rail work are not entitled to labor protective benefits because they happen to be technically employees of a subsidiary corporation is not proper and the Court of Appeals' opinion that this Court's Chevron analysis requires an affirmation of that ICC Decision should be reversed.

III. THE COURT OF APPEALS' HOLDING THAT THESE EMPLOYEES WERE NOT ENTITLED TO REVIEW OF THE INTERSTATE COMMERCE COMMISSION'S REFUSAL TO EXERCISE ITS DISCRETION TO AWARD LABOR PROTECTIVE BENEFITS WHEN THE

INTERSTATE COMMERCE COMMISSION HAD MORE THAN SUFFICIENT EVIDENCE AND LAW BEFORE IT TO MAKE A DISCRETIONARY DETERMINATION WAS IN ERROR.

The ICC had more than sufficient evidence and law before it to exercise its discretion. However, the ICC took the opportunity to denegrate the evidence presented as not being the right kind upon which to base a discretionary decision in order to avoid a decision granting labor protective benefits to employees of a railroad motor carrier subsidiary. Each and every pleading filed with the ICC and with the various courts cited the discretionary provisions of 49 U.S.C. §11344.

The ICC requested information from the Petitioners concerning their relationship with the rail-

road. Pursuant to the requirements of the ICC, Petitioners submitted approximately 146 pages of verified testimony (including that of the six Petitioners who previously settled with UP). For the sake of brevity, all of that evidence will not be restated herein. The Court's attention is drawn to various highlights including, but not limited to:

a. Petitioners were given identification cards showing "Union Pacific Railroad";

b. Petitioners were issued payroll checks showing initially "Union Pacific Railroad" and thereafter showing "Union Pacific Railroad and Missouri Pacific Railroad";

c. Petitioners performed services in ramping and deramping TOFC and COFC shipments;

d. Petitioners operated motorized vehicles known as a "piggy packer" and hostled trailers for the loading and offloading of railroad flatcars;

e. Petitioners were required to attend safety meetings together with other railroad craft employees

which were conducted by railroad management personnel;

f. Petitioners received safety awards, all of which bore the name and logo of Union Pacific Railroad;

g. Petitioners received service pins for years of service, all of which bore the name and logo of Union Pacific Railroad;

h. Petitioners regularly received magazines, newsletters and other documents from Union Pacific Railroad;

i. Petitioners were required to take physicals and were treated for job-related injuries by Union Pacific's medical doctors;

j. Petitioners were offered membership and some accepted membership into the Union Pacific Railroad Old Timers Clubs;

k. Petitioners were solicited by and contributed to United Way and other charitable functions on behalf of the Union Pacific Railroad;

l. Petitioners received information and in some instances attended Union Pacific Railroad "family day" outings with other railroad personnel;

m. Petitioners were invited and in some instances participated in Union Pacific Railroad stock purchase payroll deduction plans;

n. Some of the Petitioners were filmed on TV advertisements known as the "We're a great big rolling railroad" ads (copies of which were submitted to the Commission with Petitioners' evidence);

o. Petitioners were admitted to the Union Pacific Railroad Store;

p. Petitioners were required to wear yellow safety helmets bearing the name and logo of Union Pacific Railroad;

r. Petitioners received and were required to follow written and verbal rules and policies of Union Pacific Railroad as distributed by the railroad management personnel;

s. Petitioners were invited and some participated in the Union Pacific Railroad Credit Union;

t. Petitioners worked shoulder to shoulder with other railroad craft personnel at the same physical location;

u. Petitioners were supervised by Union Pacific Railroad management personnel as well as UPMF management personnel and were required to follow the directions of both;

v. Petitioners occasionally drove household good vans to transport furniture for Union Pacific Railroad personnel who were being transferred;

w. At least one letter of recommendation was written for a Complainant on Union Pacific Railroad Company stationery stating the Complainant had been employed by "our company" for a certain period of time and did good work; and

x. Prior to the merger, meetings were conducted with Petitioners by officials of the various merging railroads as well as the truck lines advising the employees not to worry, their jobs would be safe.

The ICC majority does not refer to any of these facts even though UP apparently agreed to most of these facts and weakly attempted to refute the facts not agreed to.

The ICC determined that consideration of the evidence of employee activity was an "unnecessary and undesirable" role.[26/] The ICC followed its decision in Pennsylvania R.Co.--Merger--New York

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[26/] ICC Decision, April 12, 1989, at 3.

Central R.Co.,[27] that the identity of the employer was determinative as to who was entitled to mandatory labor protection. "If affected, they are entitled to protection by virtue of their employment relationship and not because they perform so-called 'railroad' work."[28] There was no reason for the ICC to request the information concerning Petitioners' relationship with the railroad unless it intended to review this evidence. The nature of the employee's activities and not just the identity of the employer is a determining factor. The ICC is required to make rational decisions. The Tenth Circuit action was based solely on the identity of the

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[27] 347 I.C.C. 536 (1974).

[28] ICC Decision, April 12, 1989, p.3, Footnote 4.

employer of the railroad workers and completely ignores all of the other facts which unequivocally show both UP and the ICC have traditionally treated Petitioners as railroad employees and the work they performed as railroad work. The ICC focused solely on the fact UP was not Petitioners' employer even in light of the fact Petitioners received their wages on UP payroll checks, were supervised by UP personnel and were issued UP identification cards.

In questioning the majority's opinion, Commissioner Lamboley correctly stated "I fail to understand the relevancy of the majority's argument that determining whether employee activity is rail

work is both an unnecessary and undesirable role."[29/]

The Petitioners submit the majority of the ICC had no intention whatsoever of considering its discretionary role under 49 U.S.C. §11344. It appears obvious it was either frustrated by the reversal of its Decision in Cosby or simply desired to benefit the railroad by helping it to achieve the non-payment of labor conditions to the motor carrier employees of its wholly-owned subsidiary. The National Transportation Policy requires the ICC to consider the interests of employees of

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[29/] On the one hand, the ICC suggests the Petitioners do not submit the necessary information for the ICC to exercise its discretion but on the other hand it suggests the determination is an unnecesary and undesirable role for the ICC.

carriers.[30] The interest of those employees certainly should not be categorized as an unnecessary and undesirable role for the ICC nor should it be automatically affirmed by the courts if any possible ambiguity can be alleged. The ICC majority had all of the information necessary to afford it the opportunity to exercise its discretionary authority if it had the desire to do so. The Petitioners submit it was the intent of Congress to protect workers who work in the rail industry, not simply those who are technical employees of a railroad. The ICC had substantial evidence as previously indicated that the Petitioners worked "shoulder to shoulder" with the technical railroad employees, management and

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[30] 49 U.S.C. §10101.

union, on a daily basis. All evidence was submitted and the steadfast refusal of the ICC to view that information is clearly erroneous. Likewise, the summary affirmation of the Court of Appeals for the Tenth Circuit is contrary to law and should be reversed.

CONCLUSION

For each of the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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